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Supreme Court, U.S.
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No. 04-9728

IN THE
Supreme Court of the United States

DONALD CURTIS SAMSON,

Petitioner

v.

STATE OF CALIFORNIA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF OF THE STATES OF PENNSYLVANIA, ARKANSAS, COLORADO, HAWAII, IDAHO, ILLINOIS, KENTUCKY, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, NEVADA, NORTH DAKOTA, OREGON, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

ABSENT EVIDENCE THAT THE SEARCH OF SAMSON WAS FOR AN ILLEGITIMATE PURPOSE, THE SEARCH WAS REASONABLE SINCE IT WAS PERFORMED AS A CONDITION OF HIS PAROLE 6

A. Suspicionless Searches Are Permissible Under the Fourth Amendment Where the Government Has Special Needs Beyond the Normal Requirements of Law Enforcement 8

B. The States Have a Substantial Need to Conduct Searches of Parolees Absent Any Reasonable Suspicion of Wrongdoing As a Condition of Their Parole 10

CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Page**

Chandler v. Miller,
520 U.S. 305 (1997) 8

Colonnade Catering Corp. v. United States,
397 U.S. 72 (1970) 9

Donovan v. Dewey,
452 U.S. 594 (1981) 9

Elkins v. United States,
364 U.S. 206 (1960) 6

Griffin v. Wisconsin,
483 U.S. 868 (1987) 9, 10, 14, 17

Hudson v. Palmer,
468 U.S. 517 (1984) 9

Michigan Dept. of State Police v. Sitz,
496 U.S. 444 (1990) 8

Morrissey v. Brewer,
408 U.S. 471 (1972) 10, 11, 14

National Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989) 8, 9

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 9

New York v. Burger,
482 U.S. 691 (1987) 8, 15, 16

O'Connor v. Ortega,
480 U.S. 709 (1987) 8

TABLE OF AUTHORITIES – CONT'D.

Cases: **Page:**

People v. Reyes,
19 Cal.4th 743 (1998) 7

Skinner v. Railway Labor Executives Association,
489 U.S. 609 (1989) 8, 9, 16

United States v. Biswell,
406 U.S. 311 (1972) 9, 16

United States v. Knights,
534 U.S. 112 (2001) 6, 9, 14

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 9

Veronia School District v. Acton,
515 U.S. 646 (1995) 8, 16

Wyoming v. Houghton,
526 U.S. 295 (1999) 6

Constitutional Provisions:

U.S. Const. Amend. IV 6

Other Authorities:

Criminal Justice Statistics (2003), U.S. Dep't of Justice, Bureau of Justice Statistics 1, 12

Probation and Parole in the United States, 2004 U.S. Dep't of Justice, Bureau of Justice Statistics 11

TABLE OF AUTHORITIES – CONT'D.

Other Authorities: **Page:**

2003 State Expenditure Report, National Association of State Budget Officers 12

Does Parole Work, Urban Institute (March 2005)... 13

J. Gobert & N. Cohen, *The Law of Probation and Parole* (1983)..... 15

INTEREST OF THE AMICI

The States, along with the Federal government, share the important responsibility of administering the nation's criminal justice system. Although the prevention, detection, investigation and prosecution of crime are a critical part of that system, society's ability to reduce and eliminate crime is ultimately dependent on the effectiveness of its efforts to punish and rehabilitate those who have already been convicted in the nation's courts.

There are almost 7 million people who are in prison or under some other type of correctional supervision in the United States.[1] Of these, approximately 96 percent are in the custody or under the supervision of state authorities.[2] While the threat of incarceration is the most important deterrent to crime, 71 percent of those under the correctional supervision of the states (over 4.5 million people) are not in prison, but are on probation or parole.[3] Furthermore, of those who are in prison, a vast majority will not complete their sentence in prison, but will be placed under some type of supervised release as the last step in their rehabilitation. Although the administration of such programs typically receive less attention in terms of both resources and public scrutiny than the operation of our nation's prisons, they are no less important in furthering the goals of rehabilitation and the deterrence of crime.

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[1] Sourcebook of Criminal Justice Statistics (2003), U.S. Dep't of Justice, Bureau of Justice Statistics, at p. 479.

[2] *Id.*

[3] *Id.*

The supervision of former prisoners while on parole is a vital and necessary step in the rehabilitation process. It is completely unrealistic to believe that most prisoners can successfully transition themselves back into society without the assistance and support which parole offers. No matter what rehabilitative services the states can provide prisoners while in prison, it remains a highly controlled environment with little or no personal freedom. Prisoners are simply ill-equipped to handle the responsibilities which accompany the liberty offered to them upon their release on their own. Parole offers individuals not only support in terms of such things as counseling, job placement, and housing, but also provides supervision aimed at preventing recidivism and insuring public safety.

The *amici* States, like respondent California, will be unduly hampered in their ability to enforce the conditions of parole and insure that parolees obey the law if the same or similar standards apply to parole searches as apply to searches of members of the general population. If parole officers or the police must have probable cause or reasonable suspicion before they may conduct a search, such conditions become ineffective and largely meaningless. The deterrent effect is increased where parolees know that they can be searched at any time in accordance with the conditions of their parole. Conversely, where the States are required to provide an independent justification for a search beyond the fact that an individual is on parole, the average parolee is more inclined to believe that he or she can disregard the terms of his parole or engage in criminal activity without being caught and returned to prison. Parolees are more likely to comply with the conditions of their parole when they believe that there is a significant likelihood that they will in fact be searched as opposed to merely a theoretical possibility.

If the States are unable to conduct searches until there are already outward signs that the conditions of

parole have been broken, it is extremely difficult to intervene and take corrective measures short of rescinding parole or prosecuting the parolee for new criminal offenses. Ideally, searches of parolees should be viewed not as an attempt by the government to "catch" parolees engaged in criminal activity but instead as part of the process of rehabilitation. A system predicated on such searches is not arbitrary or capricious, but is grounded on sound penological principles. It allows parole officers to stop undesirable behavior before it is too late and while remedial measures short of returning parolees to prison can still be effective. While parole searches undoubtedly benefit society as a whole by preventing crime and increasing public safety, they directly benefit parolees by providing them with a true incentive to comply with the conditions of their parole. This is particularly important considering that most parolees lack the necessary skills and intrinsic motivation to comply with the conditions of parole on their own.

SUMMARY OF ARGUMENT

The supervision of parolees by parole authorities falls into that small class of cases, recognized by the Court, in which searches without any individualized suspicion of wrongdoing are nevertheless "reasonable" within the meaning of the Fourth Amendment. The Court has upheld such searches – of closely regulated businesses, for example – where a diminished expectation of privacy, plus an important governmental need met by the search, combine to justify them.

Certainly, parolees have a diminished expectation of privacy. The government routinely subjects convicted criminals, conditionally released on parole, to a variety of restrictions, some of which would not be constitutional if applied to the general public, and violation of which is grounds for immediate recommitment. Parolees may, for example, be forbidden to change their residence without permission, to consume alcoholic beverages or illegal drugs, to possess weapons, or to commit further crimes; they may be required to undergo treatment for drug or alcohol dependence, or to avoid certain persons or locations. Parolees are thus, like probationers, in a supervisory relationship with the government quite unlike that of free citizens.

Nor can the importance of the governmental interest be overstated. As the Court has recognized, such restrictions on parolees serve the dual purpose of protecting the public from further harmful behavior, and of furthering the rehabilitation and reintegration of the offender into society. The Court has likewise recognized the overwhelming interest of the government in promptly recommitting parolees who do not comply with the conditions of their parole.

To ensure compliance with these restrictions, government requires broad discretion to define the conditions under which the persons and property of parolees may be searched. The government may therefore require that convicted criminals, as a condition of parole, submit to searches without any need for an individualized suspicion of wrongdoing, as long as those searches are related to some legitimate penological objective such as ensuring that parolees are complying with the conditions of their release.

ARGUMENT

ABSENT EVIDENCE THAT THE SEARCH OF SAMSON WAS FOR AN ILLEGITIMATE PURPOSE, THE SEARCH WAS REASONABLE SINCE IT WAS PERFORMED AS A CONDITION OF HIS PAROLE.

The Fourth Amendment to the Constitution provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. Amend. IV. The prohibition against unreasonable searches and seizures is applicable to state officers. *Elkins v. United States*, 364 U.S. 206, 213 (1960). The "touchstone" of the Fourth Amendment is reasonableness, and reasonableness in turn is "determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

In *United States v. Knights*, 534 U.S. 112, 120-21 (2001), the Court recognized that there are special circumstances associated with probation which give the government a heightened interest in conducting searches while at the same time diminishing an individual's expectation of privacy. Although the Court in *Knights* did not need to reach the question of whether suspicionless searches of probationers was permitted under the Fourth Amendment, *see id.* at 120 n.6., the Court's analysis in that case supports such a conclusion. Furthermore, the States' interest in conducting suspicionless searches of parolees is no less substantial than its interest in conducting searches of probationers. Therefore, the Court should rule that suspicionless searches of both parolees and

probationers are permissible under the Fourth Amendment.

In the present case, the petitioner was searched by a police officer pursuant to a condition of his parole. The California Court of Appeal, following the California Supreme Court's decision in *People v. Reyes*, 19 Cal.4th 743, 752 (1998), held that a parole search does not violate the Fourth Amendment "'so long as it is not arbitrary, capricious or harassing,' and does not exceed the scope of the consent." J.A. at 12. The California Court of Appeal determined that a parolee who is released pursuant to a parole condition which permits that he be searched by law enforcement officials does not have an expectation of privacy which is violated by being searched unless the motivation for the search is unrelated to any "'rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee.'" J.A. 13.

The rule established by the California Courts should be upheld because it is supported by the plain text of the Fourth Amendment and by prior decisions of this Court which have held that suspicionless searches are permissible where the government has "special needs" which go beyond the normal needs of law enforcement. The government has a substantial interest in being able to conduct parole searches as part of the process of reintegrating those convicted of crimes back into society. Furthermore, this interest cannot be as effectively carried out through other means. The States need the flexibility to operate their parole systems in a manner which will increase their ability to successfully rehabilitate parolees, create a greater incentive for parolees to comply with the conditions of their parole, and better protect the public by preventing parolees from committing new crimes while they complete the rehabilitation process. The Court should give the States the ability to administer parole more effectively

by establishing a bright line rule which permits States to conduct suspicionless searches as a condition of parole so long as they are done for a legitimate purpose such as rehabilitation or law enforcement.

A. Suspicionless Searches Are Permissible Under The Fourth Amendment Where The Government Has Special Needs Beyond The Normal Requirements Of Law Enforcement.

To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. *Chandler v. Miller,* 520 U.S. 305, 313 (1997). The Court has recognized, however, that in some cases suspicionless searches are permissible. *Id.* (*citing Vernonia School District v. Acton,* 515 U.S. 646, 652-53 (1995) (random drug tests of student-athletes)); *Skinner v. Railway Labor Executives Association,* 489 U.S. 609, 619 (1989) (drug and alcohol tests for railway employees involved in train accidents); *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 665-66 (1989) (drug tests as condition of promotion in Customs Service); *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 447 (1990) (sobriety checkpoints along highways). The exceptions are based on "special needs, beyond the normal need for law enforcement." *Skinner,* 489 U.S. at 619.

In addition, the Court has held that in certain situations probable cause is not necessary to effect a search. The Court has held, for example, that government employers and supervisors may conduct warrantless searches of employees' desks and offices without probable cause. *O'Connor v. Ortega,* 480 U.S. 709, 721-25 (1987). Similarly, the Court has held that government investigators conducting searches of closely-regulated businesses need not adhere to the warrant or probable cause requirements as long as the searches meet reasonable legislative or administrative

standards. *New York v. Burger*, 482 U.S. 691, 702 (1987) (automobile dismantling business). *Accord Donovan v. Dewey*, 452 U.S. 594, 600 (1981) (coal mining); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (firearms sales); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (catering business engaged in liquor sales). The Court also has held that the search of a high school student's purse by school officials does not require a warrant or probable cause, *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985), as well as that, because of the extraordinary needs of those charged with administering prisons, the Fourth Amendment is inapplicable to the search of a prison inmate's cell. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). Likewise, the Court has held that law enforcement officials may stop individuals for questioning or observation at fixed border checkpoints without a particular level of suspicion. *United States v. Martinez-Fuerte*, 428 U.S. 543, 545-50 (1976). Finally, and closely analogous to this case, the Court has held that the search of a probationer's home by state probation officers, pursuant to a regulation requiring "reasonable grounds," does not require a warrant supported by probable cause. *Griffin v. Wisconsin*, 483 U.S. 868, 876-77 (1987). *See also Knights*, 534 U.S. at 121 (requiring "no more than reasonable suspicion to conduct a search of [a] probationer's house").

Thus, the Court clearly has recognized situations where the usual requirements of the Fourth Amendment simply do not apply or the particular circumstances and needs permit "exceptions" to the general rule. *Griffin*, 483 U.S. at 873; *Knights*. When such special needs exist, the Court has undertaken a "context-specific" inquiry, examining the competing interests at stake. *National Treasury Employees Union v. Van Raab*, 489 U.S. at 665-66; *Skinner*, 489 U.S. at 624. In the context of parole, the government has a substantial need to conduct suspicionless searches while at the same time the parolee has a diminished

expectation of privacy. *See Knights*, 534 U.S. at 119-21. Under these circumstances, suspicionless searches of parolees are reasonable and should be permitted by the Court.

B. The States Have A Substantial Need To Conduct Searches Of Parolees Absent Any Reasonable Suspicion Of Wrongdoing As A Condition Of Their Parole.

In *Griffin v. Wisconsin*, the court premised its conclusion that a state's operation of a probation system presents special needs, justifying departures from the usual requirements, on the fact that probation –like incarceration- is a "'form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty;" it represents one of several options on a "continuum of possible punishments ranging from solitary confinement in a maximum security facility to a dew hours of mandatory community service." 483 U.S. at 874 (citations omitted).

The operation of a system of supervised release on parole - just as a probation system - presents special needs justifying departure from the usual Fourth Amendment requirements. As the Court has recognized, the "essence" of parole is release from prison, before completion of the sentence, on the condition that the prisoner abide by certain rules during the balance of he sentence. *Morrissey v. Brewer*, 408 U.S 471, 477 (1972). Parole has become an "integral part" of the nation's overall system of managing offenders. *Id.* The Court has described parole as follows:

> Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted

> criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.

Id. In recognition of the conditional liberty restored to an offender by parole, the Court has held that revocation of parole deprives him not of an "absolute" interest but of an interest "properly dependent on observance of special parole restrictions," *id.* at 480, and the revocation needs to be accompanied by only informal procedural protections. *Id. at* 487-88.

Furthermore, as the Court recognized in *Morrissey,* to accomplish the purpose of parole, those who are granted permission to leave prison early properly may be subjected to very specific conditions. These conditions "restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen," *id.* at 478, and can include such restrictions as the need to seek permission to change residences, a prohibition against consumption of alcohol, and the direction to refrain from association with certain individuals or engaging in certain activities. *Id.*

The States have a significant interest in monitoring those individuals who are on parole to insure that they comply with the conditions of parole and do not engage in criminal activity. Unfortunately, the rate of recidivism among those on parole is relatively high. In 2004, only 46 percent of parolees successfully completed their period of supervision.[4] This raises

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[4] Probation and Parole in the United States, 2004, U.S. Dep't of Justice, Bureau of Justice Statistics, at p. 9.

concerns regarding not only the effectiveness of parole for purposes of rehabilitation, but also the effectiveness of parole in deterring crime and insuring public safety. However, limiting parole and keeping people in prison longer is not a viable solution to this problem.

The cost of building and operating prisons is already a significant constraint on the budgets of state governments. In 2003, the states spent $39.4 billion for items related to corrections.[5] This represents 3.5 percent of all expenditures in state budgets nationwide.[6] The cost to the states of corrections has been growing by 7.1 percent per year since 1990.[7] The cost of building additional prisons and paying to operate them would place an even greater strain on state budgets at a time when funding for other programs is already being cut.

Housing individuals in prison is significantly more expensive than supervising them while they live in the community. Although less than 30 percent of those under correctional supervision are in prison,[8] 81.5 percent of all expenditures go towards prison construction and operating costs.[9] In 2003, it cost the states approximately $15,200 for each inmate kept in prison. Conversely, the cost of keeping someone on probation or parole was only $1,400.[10] Even if eliminating or greatly reducing the use of probation and

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[5] 2003 State Expenditure Report, National Association of State Budget Officers, at p. 56.

[6] *Id.* at p. 4.

[7] *Id.* at p. 56.

[8] Sourcebook of Criminal Justice Statistics (2003), U.S. Dep't of Justice, Bureau of Justice Statistics, at p. 479.

[9] *Id.* at p. 14.

[10] *Id.* at pp. 14 & 479.

parole would further the goals of rehabilitation, it is not fiscally possible.

Although correctional supervision differs in significant respects among the states, all probationers and parolees are subject to terms and conditions which both facilitate the rehabilitative process and help deter the commission of new crimes. Typically, these conditions include the right of parole officers and other law enforcement officials to search individuals, their property, and their residences to determine whether they are complying with the conditions of their release. Although the scope and frequency of such searches differ, they allow state officials to monitor the activities of probationers and parolees without the types of restrictions which apply to searches of members of the general population.

As a matter of public policy, eliminating the supervision of former prisoners as they adjust to life in the community ultimately would undermine the goals of the criminal justice system. The recidivism rate of those on parole is highest during the time immediately after their release from prison and the chances of successfully meeting the conditions of parole steadily increase over time.[11] Individuals who have been recently released on parole are at a greater risk of violating the conditions of their parole or committing new crimes than any other group in the population with the possible exception of those who are simply unconditionally released from prison. Therefore, there is a definite need for the states to be able to more closely monitor the activities of those released from prison while on parole.

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[11] Does Parole Work, Urban Institute (March 2005), at p. 13, Fig. 4.

Supervision of parolees, therefore, plainly is a "special need" of the States "permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Griffin v. Wisconsin*, 483 U.S. at 875. While restrictions upon a free citizen's right to travel or to associate with others of his choosing certainly could present significant constitutional concerns, the Court has recognized that the diminished expectation of privacy of probationers and parolees, together with society's need to supervise them closely, permits these restrictions. The Court has stated:

> To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy "the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special . . . restrictions."

Griffin, 483 U.S at 874 (quoting *Morrissey*, 408 U.S. at 480).

As such, parolees are subject to conditions governing their activities that could not be imposed upon the general public but which, because of the special importance of monitoring their behavior, are appropriate and thus constitutional. *See Griffin*, 483 U.S. at 874-75. *See also Knights*, 534 U.S. at 120-21. Conditions which permit the government to search parolees are no different than conditions requiring substance abuse treatment, mental health treatment or other rehabilitative programming, all of which demonstrate diminished privacy expectations by a parole over his conduct and person. *Morrissey v. Brewer*, 408 U.S. at 478-79. As the Court noted in *Morrissey*, "[C]onditions serve a dual purpose; they prohibit, either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the

individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him." *Id.* at 478. As further explained by a leading commentator:

> The probation or parole officer has the primary responsibility for supervision of a parolee's or probationer's rehabilitative process. This caseworker, charged with monitoring the offender's performance, owes a responsibility to the public to ensure that probationers and parolees who pose a threat to public safety are not permitted to remain free absent compliance with conditions which obviate possible danger.

J. Gobert & N. Cohen, *The Law of Probation and Parole*, §8.02 (1983) (footnotes omitted).

It is thus apparent that parole plays an extremely important function in a State's overall penological system. The government not only must monitor the parolee's activities so as to assist the parolee's reintegration into society, but also must protect the public by taking action, where appropriate, to remove the parolee from society if the parole conditions are not met. There can be little doubt that, just like conditions requiring treatment or restricting his association with other offenders, a parole condition which permits searches by parole agents or by law enforcement officials is a significant tool in the rehabilitative process and in protecting society.

The Court's decisions addressing suspicionless searches in the drug-testing area and in closely-regulated businesses provide an apt analogy to the parole situation. In *New York v. Burger*, 482 U.S. 691

(1987), for example, the Court recognized that, as in other situations of special need, where the individual's privacy interest is weakened and the government's interest in regulation of behavior is heightened, a warrantless surprise inspection is reasonable if it meets certain criteria: a substantial governmental interest; a need for warrantless inspections to further the regulatory purpose; and the absence of unlimited discretion on the part of the inspection officers. 482 U.S. at 702-03. *Accord Vernonia School District v. Acton*, 515 U.S. at 661; *Skinner*, 489 U.S. at 627. The Court thus has recognized the value of unannounced suspicionless searches in the context of State regulation of commercial enterprises and other related situations where "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion...." *Skinner*, 489 U.S. at 624. In holding that warrantless inspections of junkyards by police officers did not violate the Fourth Amendment, the Court in *Burger* noted, "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *Id.* (*quoting United States v. Biswell*, 406 U.S. at 316). Indeed, as the Court stated in *Burger*, surprise is "crucial" if the government regulatory scheme is to function. *Burger*, 482 U.S. at 710.

If unannounced suspicionless searches are "'essential" and "crucial" in the context of commercial regulation, they surely are equally as important –if not more so – in the context of managing a State parole system charged with protecting the public. The value of the search depends upon the parole agent or police officer's ability to locate any contraband before the parolee has an opportunity to remove it or dispose of it. A parole search provision – like the unannounced inspection in the commercial regulatory situation and suspicionless drug testing in the railway transportation situation - thus enables the government to conduct a

search that serves as a "credible deterrent." *Id.*; *accord Skinner*, 489 U.S. at 628.

This is not to suggest, however, that such a consent provision should authorize all searches no matter when or how conducted. Just as prison inmates should be governed by policies and rules that are "reasonably related to legitimate penological objectivities," so too should parolees be entitled to expect that searches of their residence and person are reasonably related to the legitimate penological objectives of parole supervision. *Accord Griffin v. Wisconsin*, 483 U.S. at 876-77 (reasonable state regulation governing searches of probationers' homes satisfies Fourth Amendment).

The value of a parole search is eliminated if a parolee knows that the government must have a particular suspicion of a violation or must obtain a warrant before conducting a search. The Court in *Griffin* acknowledged the value of such a search, even on the basis of an "unauthenticated tip," 483 U.S. at 878, and held that the search of a probationer's residence based on such a tip was reasonable. *Id.* at 879.

> In such circumstances it is both unrealistic and destructive of the whole object of the continuing probation relationship to insist upon the same degree of demonstrable reliability of particular items of supporting data, *and upon the same degree if certainty of violation*, as is required in other contexts. In some cases - especially those involving drugs or illegal weapons – the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society. The agency,

> moreover, must be able to proceed on the basis of its entire experience with the probationer, and to assess probabilities in the light of its knowledge of his life, character, and circumstances.

Id. at 879 (emphasis added).

Although the present case involves a search of a parolee, and not a probationer; and the search was conducted by a police officer, and not a parole agent, the same principles should apply. Absent evidence that the search of Samson was for a purpose unrelated to a legitimate government interest such as rehabilitation or law enforcement, the search was reasonable since it was a valid condition of his parole. The Court should affirm the decision of the California Court of Appeal and establish a bright line rule allowing the States to conduct suspicionless searches of parolees as a condition of their release so long as it is not done for an illegitimate purpose or out of personal animosity directed towards the parolee.

CONCLUSION

The Court should affirm the judgment of the Court of Appeal of the State of California, First Appellate District, Division One.

Respectfully submitted,

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